IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. DA 10-0039

ANDY JENSEN,

Plaintiff/Appellant,

v.

ABSAROKEE WATER & SEWER DISTRICT and KARL GAUSTAD, MIKE BORSETH, MARY ANNA ESPELAND, WENDY SCOTT and DEANN GAUSTAD,

Defendants/Respondents

APPELLANT'S BRIEF

On Appeal from Montana 22nd Judicial District
Stillwater County
Hon. Randall I. Spaulding, Presiding Judge

For Appellant
Michael B. Anderson
ANDERSON & LIECHTY, P.C.
175 N. 27th Street, Suite 1902
P.O. Box 3253
Billings, Montana 59103-3253
Telephone: (406) 254-8904
Facsimile: (406) 254-8905
e-mail: manderson@a-llaw.com

For Respondents
Michael W. Sehestedt
MACo Legal Services
2717-F Skyway Drive
Helena, MT 59602-1213

Telephone: (406) 441-5472
Facsimile: (406) 441-5497
e-mail: msehestedt@mtcounties.org

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Montana Constitution

Rules of Procedure

Montana Statutes

Montana Cases

Other Authority

Q: Now, in truth, though, there's no resolution or ordinance by the board authorizing the advertisement of a position for either a full-time or a part-time general manager is there?

A: That's what you're saying.

Q: Well, you agree with me don't you, there is no resolution?

A: No. It wasn't a resolution. No, probably not.

Q: There's no ordinance?

A: Probably not.

Q: And there's no board approval is there?

A: No.

- Testimony, Board Pres. Karl Gaustad, Absarokee Water and Sewer Board. Aug. 18, 2009 Hearing, Tr. p. 183, ll. 13-25.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether judgment on the pleadings was appropriate;

2. Whether both the Board and its individual members enjoy immunity from suit challenging the conduct of meetings;

3. Whether Plaintiff's claims are time-barred;

4. Whether recordings of "executive sessions" are public records subject to inspection;

5. Whether Plaintiff has an adequate remedy at law.

STATEMENT OF THE CASE

On June 25, 2009, Board President Karl Gaustad placed an ad in the *Stillwater County News* that the Absarokee Water & Sewer District ("AWSD") was seeking a full-time general manager. [1] Andy Jensen, the District's general manager, sued them that day.[2]

Jensen sought an order enjoining the Board and its individual board members from taking any adverse actions regarding his employment, including soliciting applications for his job, until a Court could rule upon the legality of the Board's actions.[3]

Jensen complained that the Board went into "executive session" to discuss his employment for four consecutive months (January-April, 2009) from which the public was excluded despite Jensen's waiver of his right of

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[1] Exhibit 1, Plaintiff's Complaint & Application for Preliminary Injunction & Temporary Restraining Order, Write of Mandate & Demand for Trial by Jury, June 25, 2009, Appendix - Tab 4.

[2] *Id.*

[3] *Id.*, ¶¶ 21, 22, 24; "RELIEF REQUESTED," ¶ 1.

privacy. [4] The "executive sessions" were recorded, [5] but Board refused to make such recordings available to Jensen or the public despite repeated requests. [6] Jensen sought a court order that the AWSD Board make tape recordings of "executive sessions" available for review or transcription. [7]

Jensen asked for a writ of mandate to require the Board and its members refrain from (1) conducting matters in executive session without public participation, (2) refusing to make records available to the public, and (3) taking adverse employment or disciplinary action until a hearing could be held.[8]

The Board and its individual members answered, admitting that the Board could act only by ordinance or resolution.[9] They admitted that all meetings of the District are open to the public "unless closed as provided by

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[4] *Id.*, ¶¶ 26, 27, 30, 31, 33.

[5] *Id.*, ¶ 26.

[6] *Id.* ¶¶ 27, 29, 32, 36.

[7] *Id.*, "RELIEF REQUESTED," ¶ 2.

[8] *Id.*, "RELIEF REQUESTED," ¶ 6.

[9] Defendants' Answer and Demand for Jury Trial, ¶ 5, Appendix - Tab 5.

statute."[10] They did not contest that the advertisement ran, but argued that it should have been for a "full-time" rather than a "part-time" position.[11]

Defendants admitted they held meetings closed to the public, and that proceedings were recorded.[12] They argue that the recordings are not "public writings" or "public records" to which Jensen or the public are entitled.[13]

Defendants offered a number of affirmative defenses:

1. Jensen hasn't shown he is likely to sustain damages; [14]
2. Individual board members aren't personally liable for damages in the event a writ of mandate were issued; [15]
3. Jensen didn't file his action within 30 days of the meetings of which he complained;[16]

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[10] *Id.* ¶ 7.

[11] *Id.*, ¶¶ 14, 16.

[12] *Id.*, ¶¶ 26, 27, 29, 30, 31, 33.

[13] *Id.*, ¶ 29 - meeting of January 9, 2009. "NINTH AFFIRMATIVE DEFENSE," "some of the recordings ... involve advice of counsel, such recordings are privileged and not subject to open meeting laws;""SIXTEENTH AFFIRMATIVE DEFENSE."

[14] *Id.*, "FOURTH AFFIRMATIVE DEFENSE."

[15] *Id.*, "FIFTH AFFIRMATIVE DEFENSE."

[16] *Id.*, "SIXTH AFFIRMATIVE DEFENSE."

4. Some meetings involved advice of counsel and are privileged; [17]

5. Some recordings of meetings involve privacy rights of non-parties; [18]

6. Defendants have immunity for legislative acts or omissions; [19]

7. Individual board members are immune from suit arising from the lawful discharge of an official duty associated with the legislative acts of the AWSD;[20]

8. Individual board members are immune from suit for damages arising from actions taken in the course and scope of their positions; [21]

9. Recordings are not public records requiring disclosure.[22]

Following three days of testimony and months of deliberation, the district court granted judgment on the pleadings. [23] The trial court was in error - both on the facts and on the law.

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[17] *Id.*, "NINTH AFFIRMATIVE DEFENSE."

[18] *Id.*, "TENTH AFFIRMATIVE DEFENSE."

[19] *Id.*, "ELEVENTH AFFIRMATIVE DEFENSE."

[20] *Id.*, "TWELFTH AFFIRMATIVE DEFENSE."

[21] *Id.*, "THIRTEENTH AFFIRMATIVE DEFENSE."

[22] *Id.*, "SIXTEENTH AFFIRMATIVE DEFENSE."

[23] The trial transcript is 594 pages.

STATEMENT OF FACTS

Andy Jensen has been the General Manager of the Absarokee Water & Sewer District since 1998.[24] There is no written contract between him and the AWSD. [25] The district serves approximately 500 customers.[26]

By statute, a water or sewer district consists of three administrative personnel - a general manager, secretary and auditor. [27] It is governed by a board of directors whose legislative sessions must be open to the public. [28] A water board may act only by ordinance or resolution.[29]

Relations between Jensen and the Board President and Vice-President were strained. Jensen had been placed on a one-year probation

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[24] Testimony, Andy Jensen, Hearing August 31, 2009 hearing, Tr. p. 4, l. 22 - Appendix - Tab 6

[25] *Id.*, p. 7, l. 8-12.

[26] Testimony, Anna Lundbeck, Hearing August 12, 2009, Tr. p. 124, ll. 15-17.

[27] Section 7-13-2277, Mont. Code Ann. - Appendix - Tab 1

[28] Section 7-13-2274, Mont. Code Ann. - Appendix - Tab 1

[29] Section 7-13-2274(3), Mont. Code Ann. - Appendix - Tab 1; Absarokee Water & Sewer District Bylaws, November 7, 1996, "Conduct of Business," Tr. Exhibit 3, Appendix - Tab 3

in 2008.[30] Board President Karl Gaustad made known his intent to terminate Andy Jensen's employment.[31] Gaustad went so far as to solicit Board members' motion for Jensen's termination at a Board meeting; both refused.[32] Two Board members and the Board Secretary testified that they believed the Board had treated Andy Jensen unfairly.[33]

The Board attempted to extend Jensen's probation for another 6 months in January, 2009. That action was later rescinded.[34] Even after the expiration of the probationary period and the Board's rescission, Board President Karl Gaustad says he still considers Jensen to be on probationary status.[35]

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[30] Testimony, Mike Borseth, Hearing August 18, 2009, Tr. p. 43, l. 22 to p. 44, l.3.

[31] Testimony, Mike Borseth, Hearing August 31, 2009, Tr. p. 113, ll. 5-9; Testimony, Mary Anna Espeland, Hearing August 12, 2009, Tr. p. 59, l. 24-p. 60 l. 4; Testimony, Deanne Gaustad, Hearing August 12, 2009, Tr. p. 100, l. 21 to p. 101, l. 6.

[32] Testimony, Mary Anna Espeland, Hearing August 12, 2009, Tr. p. 60, ll. 8-15; Testimony, Deanne Gaustad, Hering August 12, 2009, Tr. p. 100, l. 21 to p. 101, l.6.

[33] Testimony, Mary Anna Espeland, Hearing August 12, 2009, Tr. p. 86, ll. 21-23; Testimony, Deanne Gaustad, Hearing August 12, 2009, Tr. p. 108, ll. 4-8; Testimony, Anna Lundbeck, Hearing August 12, 2009, Tr. p. 150, ll. 17-19.

[34] Testimony, Mike Borseth, Hearing August 18, 2009, Tr. p. 44, ll. 4-9, p. 84, ll. 11-12; Testimony, Andy Jensen, Hearing August 31, 2009, Tr. p. 84, ll. 12-22; Trial Exhibit 18.

[35] Testimony, Karl Gaustad, Hearing August 18, 2009, p. 219, ll. 15-23.

In June, 2009, the Board held two meetings to discuss whether it should have a "back-up manager" or "someone to fill in when the manager [was] gone."[36] No action was taken at the meeting of June 9th.[37] The Board decided on June 15th that it would make no final decision until the Board held a work session to determine its needs.[38]

So it came as a shock when, on June 25th, Andy Jensen saw an ad in the *Stillwater County News* that the AWSD was seeking a full-time General Manager.[39] Customers of the district approached him, his wife and son, asking if he had been fired or quit.[40] He filed suit that day.[41]

Board President Gaustad testified that it was the fault of the *Stillwater County News* mistakenly placing the advertisement under a

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[36] AWSD Draft Minutes, Meeting of June 9, 2009, Exhibit 28, admitted over objection. Tr. of Hearing, August 12, 2009, p. 39, l. 12. Exhibit 28, Appendix - Tab 8.

[37] Testimony Anna Lundbeck, Hearing August 12, 2009, Tr. p. 42, ll. 10-14.

[38] Minutes of Special Board Meeting, Absarokee Water and Sewer District, June 15, 2009, admitted as Trial Exhibit 28.

[39] Testimony Andy Jensen, Hearing August 31, 2009, Tr. p. 8, ll. 14-15.

[40] *Id.*, Tr. p. 9, ll. 6-24.

[41] Complaint, Appendix - Tab 5.

heading of "full-time" employment. Neither Gaustad nor the Board requested a correction, retraction or refund. Instead, Board President Gaustad ran the ad the following week under the heading of "part-time employment." He knew that there was no Board resolution or authority to hire a "part-time," "contract," or "fill-in" general manager:[42]

> Q: And so if you reviewed the draft minutes of the June 15 meeting you would have known that there was no motion approving the placement of an ad for either a full-time or part-time general manager?
>
> A: You're correct. There was nothing stating that. It was just that we needed to find some help.
>
> Q: And you took it upon yourself to run the ad?
>
> A: I guess you got it right.
>
> Q: And that's the wrong thing to do isn't it?
>
> A: Probably.
> - Testimony, Karl Gaustad, Hearing August 18, 2009, Tr. p. 193, ll. 3-16.

At least three people submitted applications in response to the newspaper ad. [43] As of the hearing, none of the them were told whether

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[42] Testimony, Karl Gaustad, Hearing August 18, 2009, Tr. p. 183, ll. 11-25, p. 185, ll. 9-21.

[43] Testimony, Anna Lundbeck, Hearing August 12, 2009, Tr. p. 51, ll. 1-10, p. 139, ll. 16-21.

they were still under consideration.[44] Board President Gaustad testified that job availability awaited the outcome of the preliminary injunction hearing.[45]

From February until suit was filed in June, the Board held at least went into four "executive sessions" to discuss Andy Jensen's performance as general manager.[46] The public was excluded from all of the sessions; Jensen was excluded from the session in which the Board tried to extend his probation. [47] Those "executive sessions" were tape recorded. Although the Board Secretary attended all such sessions, she took no minutes.

From the outset, counsel for Andy Jensen wrote letters expressing dissatisfaction with the Board's conducting meetings in "executive session." Those letters contained an express waiver of Andy Jensen's right of privacy

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[44] *Id.*, Tr. p. 145, ll. 11 to p. 146, ll. 25; Testimony, Karl Gaustad, Hearing August 18, 2009, p. 207 l. 21-208, l. 15.

[45] *Id.*, Tr. p. 203, ll. 5-7.

[46] February 2nd , March 12th, April 15th, July 14th.

[47] February 2nd.

with respect to discussions concerning his employment.[48] They asked for access to the recordings of the "executive session" tapes.[49] Andy Jensen and counsel continued to waive Jensen's privacy rights in subsequent Board meetings.

STANDARD OF REVIEW

A party moving for judgment on the pleadings under Rule 12(c) M.R.Civ.P., must establish that no material issue of fact remains and that it is entitled to judgment as a matter of law. *Hedges v. Woodhouse,* 2000 MT 220, ¶ 8, 301 Mont. 180, 8 P. 3d 109, *citing Clayton by Murphy v. Atlantic Richfield Co.*, 221 Mont. 166, 169-70, 717 P.2d 558, 560 (1986).

When considering a Rule 12(c) motion, the court must assume that all the well-pleaded factual assertions in the non-movant's pleadings are true and that all contravening assertions in the movant's pleadings are false.

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[48] Testimony, Mary Anna Espeland, Hearing August 12, 2009, Tr. p. 57, ll. 18-21

[49] Letter dated February 9, 2009, admitted as Exhibit 11;
Letter dated February 18, 2009, admitted as Exhibit 13;
Letter dated March 5, 2009, admitted as Exhibit 14;
Letter dated March 10, 2009, admitted as Exhibit 15;
Letter dated March 13, 2009, admitted as Exhibit 19;
Letter dated April 6, 2009, admitted as Exhibit 21;
Letter dated April 21, 2009, admitted as Exhibit 22
The letters are contained in the Appendix - Tab 11.

Firelight Meadows, LLC v. 3 Rivers Telephone Co-Op, Inc. 2008 MT 202, ¶11, 344 Mont. 117, 186 P. 3d 869. A district court's decision on motion for judgment on the pleadings is a conclusion of law. *Id.*, ¶ 12. The Montana Supreme Court reviews such decisions *de novo* to determine whether the decision was correct. *Id.*

A motion for judgment on the pleadings is designed to provide a means of disposing of cases when the material facts are not in dispute between the parties and a judgment on the merits can be achieved by focusing on the content of the competing pleadings, exhibits thereto, matters incorporated by reference in the pleadings, whatever is central or integral to the claim for relief or defense, and any facts of which the district court will take judicial notice. *Id.*, ¶ 10, *citing* Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* Vol. 5C, § 1367 at 206-07 (3d ed., Thomson-West 2004). The motion "only has utility when all material allegations of fact are admitted or not controverted in the pleadings and only questions of law remain to be decided by the district court"--e.g., where the sole question is the interpretation of a statutory provision. Federal Practice and Procedure, § 1367 at 207-10. If all material

issues cannot be resolved on the pleadings, then a summary judgment motion or a full trial is necessary. Federal Practice and Procedure § 1368 at 248-51.

If matters outside the pleadings are presented, a motion for judgment on the pleadings is to be treated and disposed of as one for summary judgment, as provided by Rule 56, M. R. Civ. P.[50]

SUMMARY OF ARGUMENT

1. The Court improperly granted judgment on the pleadings.

   a. There is no dispute that the ad for a full-time general manager ran in the *Stillwater County News* without Board approval. Either the Board or Board President Gaustad acted illegally, without authority or Board resolution.

   b. Neither the Board nor its individual Board members have discretion to ignore the Montana Constitutional provisions regarding the conduct of the public's business.

   c. Plaintiff raised genuine issues of material fact, including:

      (1) Whether the Board approved the placement of the

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[50] **Rule 12(c) Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the poleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

ad, or Board President Gaustad acted outside the course and scope of his responsibilities;

(2) Whether the Board or Board President Gaustad's actions after the discovery of the alleged "mistake" were appropriate;

(3) Whether the Board failed to properly advise Andy Jensen of his right to waive his right of privacy;

(4) Whether the Board acted properly when it discussed matters relating to Andy Jensen's employment in "executive session" after he had expressly waived his right of privacy;

(5) Whether the recordings of discussions in "executive session" are "public records" which should have been provided for inspection;

(6) Whether the Wrongful Discharge Act provides an adequate remedy at law.

2. The Court improperly granted both the Board and the individual Board members immunity.

a. Individual employees are immune ***only if*** there is recovery against the governmental entity ***and*** the entity acknowledges that the employees' conduct arose out of the course and scope of the their employment;

b. Either the Board has to admit that it authorized the ad without holding a public meeting, or that Board President Gaustad acted outside the course and scope of his responsibilities and, therefore, is not immune from suit.

3. Plaintiff's claims were timely filed:

   a. Suit was filed the same day that the ad ran - alleging either that the Board authorized its placement without holding a public meeting, or that Gaustad acted illegally and without authorization;

   b. Plaintiff's claims regarding the Board's conduct of meetings does not challenge past meetings, but raises the issue whether mandamus is appropriate to compel the Board's future compliance with applicable law;

   c. Plaintiff's claims that the Board refuses to make public records available is a present, ongoing and continuing claim separate and apart from whether the Board violated the open meeting laws.

4. Tape recordings of the "executive sessions" should be produced:

   a. Either the "executive sessions" were taken in the scope and course of the Board and its members' "official business," for which the individual Board members seek immunity, or

   b. Such actions were not "official business," in which case individual Board members have no immunity;

   c. The Board had no authority to conduct an "executive session" regarding Jensen's employment where he waived his right of privacy. Records made during such sessions are not "private;"

   d. The Board Secretary and Board President have reviewed recordings taped in the same manner as those of the "executive sessions;" the inability of the court reporter to decipher the audio recordings shouldn't prevent an attempt to recover the information from the Board's recording system.

5. The Wrongful Discharge Act is not an adequate remedy at law. It provides no remedy for a violation of Andy Jensen's constitutional and statutory rights, nor is it *adequate* to protect Andy Jensen's right to employment.

ARGUMENT

1. THE TRIAL COURT ERRED IN GRANTING JUDGMENT ON THE PLEADINGS

There is no dispute about the following facts:

An advertisement that the Absarokee Water and Sewer District was seeking a full-time general manager ran in the Stillwater County News.

The Board can act only by ordinance or resolution.[51]

There was no Board resolution or ordinance authorizing the placement of the ad for either a "full-time," "part-time", "fill-in" or "back-up" general manager.

The Board decided on June 15th that "no final decision will be made at the work session."[52]

There was no work session.

There was no final decision by the Board.

The ad ran anyway.

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[51] Section 7-13-2274(3), Mont. Code Ann. - Appendix - Tab 1; Absarokee Water & Sewer District Bylaws, November 7, 1996, "Conduct of Business," Tr. Exhibit 3, Appendix - Tab 3.

[52] Minutes of Special Board Meeting, Absarokee Water and Sewer District, June 15, 2009, Trial Exhibit 29.

Andy Jensen filed suit the same day the ad appeared. The ad ran again, *after* suit was filed.

The Board took no action to correct any "mistakes" in placing the ad, if there were mistakes.

Three people applied for the position in reliance on the published ad.

The Board hasn't done anything concerning those applications- either to advise applicants that the position is not available or that the advertisement ran by mistake.

The Court's Order is silent on the very action which triggered the filing of the suit - the unauthorized placement of the ad. The Court took a pass on that issue. Issues relating to whether the ad was even placed by "mistake," or whether it should've been listed as "part-time" instead of "full time," or whether it was properly disavowed or corrected, or whether Andy Jensen has suffered damage are, at most, questions of fact which preclude a grant of judgment on the pleadings.

Under Rule 12(c), M.R.Civ.P., the allegations of the Complaint are to be taken as "true," and the Board and individual Board members assertions to the contrary are to be treated as false. *Firelight Meadows, LLC v. 3*

Rivers Telephone Co-Op, Inc. 2008 MT *supra* ¶ 11. Jensen's Complaint properly states a claim; dismissal by judgment on the pleadings is erroneous as a matter of both law and fact.

Despite its assertions to the contrary, the Court actually decided disputed issues of fact and law.

It decided that both the Board and its individual Board members were entitled to immunity, even when one of its members acts directly contrary to the Board's express direction, or when the Board acts contrary to the Open Meeting law or its own bylaws.

It decided that the Board and its members were immune for its *conduct* of the board meetings, contrary to the holding in *Denke v. Shoemaker*, 2008 MT 57, ¶ 56-57, 347 Mont. 322, 198 P. 3d 284.

It decided that the Board did not have to notify an employee that he could exercise his right to waive his privacy interest. *Goyen v. City of Troy,* 276 Mont. 213, 218, 95 P. 2d 824, 828 (1996).

It decided that the meetings in "executive session" did not have to be open and public, even after Andy Jensen waived his right to individual privacy. Section 2-3-203(3), Mont. Code Ann.

It decided that the Board, or its President, had discretion to act without a Board resolution or ordinance.

It decided that the Board has no obligation to provide records of actions taken "within the course and scope of legitimate duties" to the public.

It decided that the issue regarding audio tapes "may well be moot,"[53] even though it heard testimony that both the Board President and the Board Secretary went back to listen to public meeting discussions recorded on the same device without apparent difficulty.[54]

It decided that Plaintiff's request for access to the tape recordings of

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[53] Order, fn. 24.

[54] Testimony, Karl Gaustad, Hearing August 18, 2009, Tr. p. 192, ll. 4-9; testimony, Anna Lundbeck, Hearing August 12, 2009, Tr. p. 117, ll. 14-16.

"executive sessions" somehow expired after 30 days, when in fact, the request was independent of any challenge to the open meeting requirements of the Montana Constitution, statute or organization by-laws.

It decided that Plaintiff's claims that the Board disregarded his rights applied only to "actions previously taken," rather than demonstrating a repeated course of action by the Board in the conduct of its meetings which is likely to continue absent a court order.

The Court also implicitly decided issues of credibility - it had to to reach the conclusion that Defendants' showed that even their clearly unauthorized acts fell within the ambit of the course and scope of the Board's and the members' discretion, course and scope of authority.

2. THE COURT IMPROPERLY GRANTED BOTH THE BOARD AND THE INDIVIDUAL BOARD MEMBERS IMMUNITY.

The Court relied on Section 2-9-305, Mont. Code Ann. in concluding that it "prevents recovery against *both* the Absarokee Water and Sewer

District and the individuals [*sic*] board members. [55] The Court misreads the statute. The statute bars recovery against an individual employee *provided* there is recovery against the governmental entity *and* the governmental *acknowledges or is bound* by a judicial determination.

Such was the case in *Kenyon v. Stillwater County*, 254 Mont. 142, 146-7, 835 P. 2d 742, 745 (1992), where *both* the Stillwater County Attorney *and* the Commissioners acknowledged that termination of the County Attorney's secretary occurred within the course and scope of the County Attorney's "official" duties.

The Board can't have it both ways - it either has to allow recovery against the Board because the act arose out of the course and scope of its President's official duties, or declare that Gaustad's decision to place an unauthorized ad falls outside the course and scope of his employment.

By the same token, either the Board or the Board members has to stand liable for their failure to provide for citizen participation, open

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[55] Order, p. 5 - Appendix -7.Tab

meetings, inspection of records and full legal redress for any injury inflicted upon Andy Jensen.

The Court erred in dismissing the claims of both the Board and its individual members.

3. PLAINTIFF'S CLAIMS WERE TIMELY FILED.

The Court treats Plaintiff's Complaint as one challenging the Board's Open Meeting violations. That missed the point. Much as Plaintiff disagrees with the Board's actions, the gravamen of the Complaint is the advertisement of Andy Jensen's job. The reason that Jensen makes reference to the prior violations of the Open Meeting laws relates to the manner in which the Board *conducts* its meetings, its refusal to change its behavior even after it received numerous letters questioning the legality of its manner of conducting such meetings as evidence of the probability - even certainty - that it would continue to conduct its meetings in similar fashion absent a court order requiring them to do otherwise.

Suit was filed the same day as the action which gave rise to the Complaint. It could not have been filed more timely.

In addition, Plaintiff's Complaint alleges on-going and continuing refusal to make public records available for inspection. That has nothing to do with the Open Meeting laws or statutes requiring actions be filed within 30 days.

The decision that claims are time-barred is clearly erroneous.

4. TAPE RECORDINGS OF THE "EXECUTIVE SESSIONS" ARE PUBLIC RECORDS WHICH SHOULD BE PRODUCED.

The Court is wrong in its agreement that the decision to close meetings of the Board is a discretionary act. [56] While it is true that a presiding officer *may* close a meeting when discussion relates to matters of individual privacy (and then, only when he determines that the right of privacy *clearly exceeds* the merits of disclosure), there is no discretion where the right of privacy is waived: in that event, the meeting *must be*

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[56] *Id.*, p. 8.

open. Section 2-3-203(3), Mont. Code Ann.

The Court is wrong in its conclusion that tape recordings of discussions held in closed meetings are "arguably private" and not subject to public disclosure. [57] A "public record" includes any "document" (including magnetic tape recordings) made or received by any local government to document the transaction of "official business." Section 2-6-401(2), Mont. Code Ann.

The Board cannot have it both ways - arguing that its individual members are immune because they conducted "official business" in the "executive sessions," then arguing that recordings made of those sessions are "private" records. The fact that the Board Secretary does not take notes of "executive sessions" is further evidence that the Board knows that such records are "public records." To hold otherwise would render the public's right to know and participate in the actions of its governing bodies meaningless.

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[57] *Id.*, p. 10.

The Court is arguably wrong in asserting that the issue is moot because its court reporter was unable to transcribe the tapes. Both the Board Secretary and the Board President testified that they listened to tape recorded sessions of Board's public meetings. The identical equipment was used to record the "executive sessions." To date, no one has tried to determine whether the substance of the meetings can be retrieved using the Board's equipment.

5. THE WRONGFUL DISCHARGE ACT IS NOT AN ADEQUATE REMEDY AT LAW.

The trial court erred in determining that Andy Jensen has an adequate remedy at law and denying his request for injunction or a writ of mandate. In so deciding, the Court mistakenly posits the notion that the Montana Wrongful Discharge Act provides an adequate remedy "should such [termination of employment] come to pass."[58]

First off, the Montana Wrongful Discharge Act provides no remedy for violation of rights guaranteed by the Montana Constitution, among

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[58] *Id.*, p. 14.

them, the right to examine documents or observe the deliberations of public agencies, the right to due process or the right to full legal redress for injury incurred in employment. Article II, Sections 4, 8, 9, and 16, Montana Constitution.

Further, Plaintiff has demonstrated, based on the past actions of the Board in refusing to honor his request to waive his right of privacy, to inspect records of the "executive sessions" in which matters relating to his employment were discussed, and conducting meetings in "executive session" even after they were advised that such meetings might violate the Open Meeting laws, not to mention the Board's own by-laws, that the manner in which future meetings would be conducted would continue unless it were ordered to stop.

Mandamus is appropriate to require a public body to perform acts which it has a "clear legal duty" to perform. Section 27-26-102, Mont. Code Ann.; *Kadillac v. Anaconda Co.*, 184 Mont. 127, 143, 602 P.2d 147, 157 (1979); *Board of Trustees, Huntley Project School Dist. No. 24, Worden v. Bd. of Co. Comm'rs, Yellowstone County* 186 Mont. 148, 158, 606 P. 2d

1069, 1074-5 (1980).

The Court ruled that the Board's actions were "discretionary." That was clear legal error. There is no "discretion" to fail to notify an employee that they have a right to waive their right of individual privacy. *Goyen v. City of Troy*, 276 Mont. 213, 218, 95 P. 2d 824, 828 (1996).

Once an individual waives their right of privacy, there is no "discretion" to determine that the demands of individual privacy still outweigh the merits of public disclosure. Section 2-3-203(3), Mont. Code Ann.

There is no "discretion" for a Board to approve, without a public meeting, or for a Board President to act without board resolution or ordinance. Section 7-13-2274, Mont. Code Ann. Neither is there "discretion" to staff a water or sewer district with multiple general managers, "contract," "part-time," "back-up" or "fill-in" general managers. Section 7-13-2277(1), Mont. Code Ann.

Finally, injunction and mandamus are proper to prevent the threatened commission of an improper act. While the Montana Wrongful Discharge Act may provide some remedy, it falls far short of providing the equivalent of continued employment. Where a public body threatens to perform an illegal future act which threatens a person's employment, both injunction and mandamus are appropriate remedies. Where a court has the opportunity to prevent imminent, irreparable injury, it should act upon an appropriate request, rather than letting careers be ruined and damage which can be prevented by requiring a public body to act lawfully.

CONCLUSION

Plaintiff requests that this Court reverse Order of the trial court and remand the case with direction to issue a writ of mandate and injunction in favor of Andy Jensen.

DATED this 27th day of April, 2010.

ANDERSON & LIECHTY, P.C.

MICHAEL B. ANDERSON
175 North 27th Street, Suite 902
P.O. Box 3253
Billings, Montana 59103-3253
Attorney for Applicant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this **Applicant's Brief** is printed with a proportionately spaced George text typeface of 14 points; is double spaced; and the word count calculated by WordPerfect 9.0 for Windows, is not more than 10,000 words (5259), not averaging more than 280 words per page, excluding Certificate of Service and Certificate of Compliance.

DATED this 27th day of April, 2010.

ANDERSON & LIECHTY, P.C.

By: _____
Michael B. Anderson

CERTIFICATE OF SERVICE

I hereby certify that I served true and accurate copies of the foregoing **APPLELLANT'S BRIEF** by depositing said copies into the U.S. Postal Service, postage prepaid, addressed to the following:

Michael W. Sehestedt
MACo Legal Services
2717-F Skyway Drive
Helena, MT 59602-1213

Dated this 27th day of April, 2010.

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